

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2007 OAL DETERMINATION NO. 3
(OAL FILE # CTU 06-0628-01)

REQUESTED BY: MICHAEL PRICE

**CONCERNING: DEPARTMENT OF CORRECTIONS AND
REHABILITATION – PERSONAL PROPERTY LIMITS
PLACED ON CALIFORNIA INMATES**

**DETERMINATION ISSUED PURSUANT TO
GOVERNMENT CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule is an “underground regulation” as defined in Government Code section 11340.5, and must, therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On June 18, 2006, Mr. Michael Price submitted a petition to the Office of Administrative Law (OAL), alleging that the California Department of Corrections and Rehabilitation (CDCR) employs an underground regulation in violation of Government Code section 11340.5¹. The alleged underground regulation is the Authorized Personal Property Schedule (APPS) which was adopted in March of 2005 as Article 43 of Chapter 5 of the CDCR Department Operations Manual (DOM). The APPS enumerates in great detail the types and quantities of property an inmate is allowed to possess based upon the inmate’s classification. APPS provisions cover the type and number of clothing items an inmate may have, and the specific type of appliances, grooming products, food products and other property. For example, an inmate in Privilege Group U may have “Pencil Sharpener (non-electric, hand held only, no metal cover, maximum 2” length)”, or “Tennis Shoes (no shades of red or blue, low mid, or high tops are permitted, must be predominantly white in color, no K-Swiss, Bugle Boys, Joy Walkers, Pumps, Gels, British Knights or Airlifts. Shoe laces, white only, not to exceed \$75.00, no hidden

¹ Unless specified otherwise code references are to the California Government Code.

compartments, zippers, or laces that are covered or concealed, no metal components including eyelets.”

DETERMINATION

OAL determines that the Memorandum meets the definition of an underground regulation, is subject to the rulemaking requirements of the APA, and, therefore, was issued in violation of the APA.

FACTUAL BACKGROUND

On March 7, 2005, in a memorandum issued to all CDCR institutions, Suzan Hubbard, the Deputy Director of CDCR indicated that the APPS had been adopted to standardize allowable inmate property. Prior to this memorandum each institution determined what property would be allowed and in what quantities. The APPS was added to the DOM to ensure that inmates would not be subject to arbitrary or conflicting rules when transferring to different institutions. CDCR reasoned that a limitation in type and quantity of items allowed by inmates is necessary to protect both inmates and staff at institutions.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the Administrative Procedure Act (APA). It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency employs a rule in violation of section 11340.5 it is employing an underground regulation. “Underground regulation” is defined in title 1, Cal. Code Regs. § 250 as follows:

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

To determine that an agency employs an underground regulation in violation of section 11340.5, it must be demonstrated that the agency employs a regulation, that the regulation has not been adopted pursuant to the APA, and that the rule is not subject to an express statutory exemption from the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5(b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference”² in any subsequent litigation of the issue.

DEPARTMENT OPERATIONS MANUAL

For many years, the CDCR, through its predecessor agencies, maintained a “family of manuals.” These manuals contained most of the statewide rules governing prison administration. In 1990, these individually titled one-volume manuals were replaced by a nine-volume compendium entitled the “Department of Corrections Operations Manual” or DOM. The APPS is found in Chapter 5 of the DOM starting with Article 43, section 54030.17.

Before the adoption of the DOM, a number of judicial decisions and OAL determinations found that various CDCR manuals and manual provisions violated the statutory prohibition against agency use of “underground regulations” found in Government Code section 11340.5. In 1982, for example, the California Court of Appeal struck down Forms 839 and 840 (new classification standards), which had been issued as part of an administrative bulletin for inclusion in the Classification Manual.³ In 1987, OAL determined that the Classification Manual itself contained regulatory material and thus violated Government Code section 11340.5.⁴

In 1991, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.⁵ In this latter case, the Department had conceded that “much” of DOM violated the APA; the court found that “a substantial part” was regulatory (i.e., subject to the APA).

² *Grier v. Kizer* 219 Cal.App.3d 422, 268 Cal.Rptr. 244; 1990

³ *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130

⁴ 1987 OAL Determination No. 3, CRNR 87, No. 12-Z, March 20, 1987, p. B-74.

⁵ *Tooma v. Rowland* (Sep. 9. 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections “to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act,” typed opinion, pp. 3-4).

ANALYSIS

A determination of whether the challenged rules are “regulations” subject to the Administrative Procedure Act (APA) depends on (1) whether the challenged rules contain “regulations” within the meaning of section 11342.600, and (2) whether the challenged rules fall within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western Inc. v. Victoria Bradshaw*, 14 Cal.4th 557, 571 (1996), the California Supreme Court found that

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. The APPS in question here applies to all prisoners in California institutions and therefore it applies to a clearly identified class of persons. CDCR, in a letter dated March 7, 2005, indicated that the APPS is intended to standardize property rules throughout California institutions. The first element is, therefore, met.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Penal Code 5058 gives CDCR broad authority to prescribe and amend rules and regulations for the administration of California institutions. It is well within CDCR's statutory mandate to determine the quantities and types of property that an inmate may have. The APPS indicates what items will be allowed and in what quantity. This clearly implements, interprets or makes specific the law enforced or administered by CDCR or governs CDCR's procedure. The second element in the *Tidewater* case is met.

The final issue to examine in determining whether CDCR has created an underground regulation by issuing the APPS is determining if there is an exemption from the APA. The CDCR has not called our attention to, nor have we located, any statutory provision expressly exempting rules of the CDCR from the APA. OAL therefore concludes that APA rulemaking requirements generally apply to the CDCR.

In its reply to the petition, CDCR argues:

1. The type and amount of personal property available to inmates changes constantly in response to the products available and carried by vendors and in reaction to security breaches involving the property. To require the APPS to be placed into regulation would be to require them to undergo “perpetual rulemaking.”
2. That case law, in the form of *Alfaro v. Terhune*, 98 Cal.App.4th 492 (2002), allows for discretion on the part of an agency in deciding whether regulations are necessary or appropriate.
3. That by approving regulations that cover much of what is contained in the DOM regarding inmate property, the OAL has given tacit approval of the APPS.

The first argument is undoubtedly true; however, the need to undergo “perpetual rulemaking” does not create an exemption from the APA. OAL can only determine whether a rule meets the definition of an underground regulation. We cannot create exemptions where none specifically exist. Additionally, this argument fails to acknowledge that if an emergent situation requires immediate action, CDCR has the ability to use the APA’s emergency rulemaking procedure or CDCR’s own unique ability to adopt regulations using “operational necessity” pursuant to Penal Code section 5058.3⁶.

⁶ Penal Code section 5058.3 provides: “(a) Emergency adoption, amendment, or repeal of a regulation by the director shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except with respect to the following:

“(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency adoption, amendment, or repeal of a regulation shall be 160 days.

“(2) Notwithstanding subdivision (b) of Section 11346.1 of the Government Code, no showing of emergency is necessary in order to adopt, amend, or repeal an emergency regulation if the director instead certifies, in a written statement filed with the Office of Administrative Law, that operational needs of the department require adoption, amendment, or repeal of the regulation on an emergency basis. The written statement shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure. This paragraph provides an alternative to filing a statement of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code. It does not preclude filing a statement of emergency. This paragraph only applies to the initial adoption and one readoption of an emergency regulation.

“(3) Notwithstanding subdivision (b) of Section 11349.6 of the Government Code, the adoption, amendment, or repeal of a regulation pursuant to paragraph (2) shall be reviewed by the Office of Administrative Law within 20 calendar days after its submission. In conducting its review, the Office of Administrative Law shall accept and consider public comments for the first 10 calendar days of the review period. Copies of any comments received by the Office of Administrative Law shall be provided to the department.

“(b) It is the intent of the Legislature, in authorizing the deviations in this section from the requirements and procedures of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the

In the second argument, CDCR cites *Alfaro v. Terhune*, 98 Cal.App.4th 492 (2002), which states that agencies should be given discretion in deciding whether to adopt regulations or not. However, the court made this ruling very narrow by continuing, “The test is whether, giving due deference to the discretion of the agencies charged with implementing the Act, it can be said that the Act is too vague and indefinite to be implemented without administrative regulations.”

In this instance the statutes that CDCR has implemented, interpreted, and made specific are vague and indefinite in terms of what property a prisoner may have. They do not list in detail what items of property a prisoner may have and in what quantity. The relevant statutes are general in nature and are not sufficient without regulations. In this instance CDCR does not meet the rule of *Alfaro v. Terhune* which says that, “To be enforceable, a law must be sufficiently precise as to give a person of ordinary intelligence a reasonable opportunity to know what is required and provide a sufficient standard for enforcement so that arbitrary and discriminatory enforcement may be avoided.”

CDCR’s final argument is that CDCR has already adopted regulations concerning personal property and that OAL gave a tacit permission to the use of the APPS. The regulations are found in Title 15, California Code of Regulations sections 3044, 3314, and 3315. These sections link personal property to the inmate’s classification. They do not, however, include any level of specificity of the amount or type of such property. By adopting partial regulations on the issue, and by the express terms of the APPS itself, CDCR has acknowledged the need for standards of general application to control inmates’ personal property.

CDCR’s response states that it adopted those regulations establishing the essential regulatory framework for inmate property. It relied on OAL’s expertise in adopting this approach. We have reviewed the Final Statement of Reasons for the regulations cited by CDCR and we find no evidence in the file that would confirm any discussion of a document like the APPS. There may have been a miscommunication; however, OAL cannot perpetuate a situation which is in violation of the APA.

CONCLUSION

In the past each individual institution made the decision on what items of property an inmate could maintain. However, when CDCR in 2005 promulgated a general rule for all institutions indicating what and how much property inmates may have they created an underground regulation. By requiring the APPS to be used within each institution CDCR is enforcing an underground regulation.

Government Code, to authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.”

WILLIAM L. GAUSEWITZ
Director

P. GIBSON
Staff Counsel

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225